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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALONZO BERNAL, Defendant and Appellant.	E069012 (Super.Ct.No. FWV020492) OPINION

APPEAL from the Superior Court of San Bernardino County. Bridgid M. McCann, Judge. Affirmed.

Law Office of Ricci & Sprouls, John E. Ricci and Frank P. Sprouls for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Marvin E. Mizell, and James Toohey, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Alonzo Bernal is a lawful resident of the United States. In 2000, he pled no contest to possession with intent to manufacture methamphetamine (Health & Saf. Code, § 11383, subd. (c)(1)). In exchange, he was placed on formal probation for a period of three years on various terms and conditions of probation. In 2010, upon return to the United States from his native country, Mexico, defendant was apprehended by the federal government and placed in removal proceedings in federal immigration court. Approximately seven years later, in 2017, defendant filed a motion to vacate his 2000 plea pursuant to Penal Code[1] section 1473.7, arguing his conviction was legally invalid because his trial counsel incorrectly advised him about the immigration consequences of his guilty plea and he was prejudiced as a result. The trial court denied defendant's motion to vacate, and defendant appealed.

On appeal, defendant argues the trial court erred in denying his motion to vacate his conviction because he established by a preponderance of the evidence that his counsel's performance was constitutionally deficient and that he suffered prejudice as a result. He also asserts that his trial counsel rendered ineffective assistance of counsel by failing to negotiate an "'immigration safe'" plea to being an accessory after the fact under section 32. He maintains that if his counsel had properly advised him of the "precise

[1] All future statutory references are to the Penal Code unless otherwise stated.

immigration consequences" of the conviction, he would not have entered a no contest plea. We reject defendant's contention and affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND[2]

On June 21, 2000, a California Highway Patrol officer initiated a traffic stop on defendant's vehicle. Defendant was the driver of the vehicle, and codefendant Michel Lopez was the passenger of the vehicle. The officer noticed that defendant was trembling and unusually nervous. In addition, defendant and the codefendant gave inconsistent statements to the officer. Defendant stated that he and the codefendant had flown to Ontario, California from San Jose, California the previous day to visit a friend of the codefendant's in Ontario. Defendant was unable to provide the name or address of the codefendant's friend. On the other hand, the codefendant reported that they were visiting a friend of defendant by the name of "Javier," but he could not remember the name of the city in which Javier lived.

The officer eventually conducted a consensual search of the vehicle and found 20 boxes that contained 2,880 bottles, totaling 354,600 pills of pseudoephedrine. The officer estimated that the amount of pseudoephedrine could be processed into approximately 40 pounds of methamphetamine. The codefendant reported that the pills

[2] The factual background of the underlying offense is taken from the probation report.

were vitamins for working out and that they were taking them back home with them. The codefendant would not say where he got the pills from.

The officer placed defendant and the codefendant in the patrol car and secretly taped their conversation. The tape revealed that defendant and his codefendant both were knowledgeable of and involved in the transportation of the contraband. Specifically, they were aware of what they were doing and were upset that they had been caught. They kept repeating to each other, "'Let's just say that we don't know anything about it,'" and mentioned "'Javier'" was the person who had picked up the pills from the source.

On June 23, 2000, a felony complaint was filed charging defendant and codefendant Lopez with one count of possession with intent to manufacture methamphetamine (Health & Saf. Code, § 11383, subd. (c)(1)).

On September 28, 2000, defendant signed a form entitled "Declaration by Defendant and Court re Findings re Plea of Guilty Under Penal Code Section 859a" (the plea advisement form). The plea advisement form described the terms of the plea, certain constitutional rights and an acknowledgement of his waiver of such rights, and the consequences of his plea. Next to each paragraph was a box, which defendant initialed. Defendant initialed the box stating that he had sufficient time to consult with his attorney concerning his intent to plead no contest to the charge against him, that his lawyer had "explained everything on this declaration to [him]," and that he had "sufficient time to consider the meaning of each statement." This box also stated that defendant had placed his initials "in certain boxes on this declaration to signify that [he] underst[oo]d and

adopt[ed] as [his] own the statements which correspond to those boxes." Among the specified consequences of the plea defendant initialed is the following: "IF I am not a citizen of the United States, I WILL be deported, or excluded from admission to the United States, or denied naturalization." The plea advisement form interlineated the word "WILL" for "could." Defendant initialed each relevant box and signed the form. He also initialed the box stating he could not "read/understand English," but that he had the assistance of an interpreter to read the plea advisement form and that he "now underst[oo]d all of the contents of this form." Immediately below that statement, a Spanish interpreter signed the form. The interpreter declared under penalty of perjury that she had translated the entire contents of the form from English to Spanish for defendant. Defendant's attorney also signed the form below a statement that he had "personally read and explained the contents of the above declaration to the defendant," and that he had "personally observed the defendant sign the said declaration form . . . ."

At a hearing held on the same day that defendant signed the plea advisement form, the trial court asked defendant whether he had initialed and signed the plea advisement form. Defendant responded "Yes" to both questions. The court also explained the maximum penalty for the offense, as well as, the immigration consequences for pleading to the charge. The court specifically asked defendant, "Do you understand if you're not a citizen of the United States, you . . . will be deported or excluded from admission to the United States or denied naturalization?" Defendant replied, "Yes." The court thereafter informed defendant of his constitutional rights, whether defendant understood his

constitutional rights, and whether defendant was waiving those rights by pleading to the charge. Defendant indicated that he understood his constitutional rights and that he was waiving those rights. In response to defense counsel's question, defendant also indicated that no one had threatened him or his family or forced him to get him to plead guilty. After the parties stipulated to a factual basis for the plea, defendant pled no contest to the offense of possession with intent to manufacture methamphetamine in violation of Health and Safety Code section 11383, subdivision (c)(1).

In May 2010, upon defendant's return from Mexico, federal immigration officers apprehended defendant and served him with a notice to appear in immigration court to respond to charges that he was subject to removal from the United States as a result of his of 2000 conviction.

Approximately four years later, in July 2014, an immigration court ordered defendant removed from the United States to Mexico. Defendant appealed to the Board of Immigration Appeals (BIA) and the United States Court of Appeals for the Ninth Circuit. The BIA affirmed the immigration court's order, and the Ninth Circuit denied defendant's appeal.

In 2015, defendant filed a petition for writ of coram nobis. Defendant's petition was denied on September 18, 2015.

Subsequently, on January 11, 2017, defendant filed a motion to vacate or withdraw his plea pursuant to section 1473.7. Defendant filed amended motions to vacate the plea pursuant to section 1473.7 with supporting exhibits on May 18, 2017, and

June 27, 2017. He asserted that his counsel was constitutionally deficient by failing to accurately advise him about the specific immigration consequences of his plea. In his declaration in support of his May 2017 amended motion, he declared that "[a]t no time did [his] attorney ever explain to [him] the precise immigration consequences of the crime that [he] was charged with" and that he would have "willingly gone to trial" if he knew that he was "facing permanent deportation." In his declaration in support of his June 2017 amended motion, he declared that "At one point, [he] asked [his trial counsel] if [he] would face any immigration charges and [he] recall[ed] that [his trial counsel] gave a vague response however, he most assuredly did not tell [him] that a conviction under H&S 11383 is considered an aggravated felony under the immigration laws and that [he] would have no relief from removal if [he] was convicted of an aggravated felony." In this same declaration, defendant also asserted that "I have been shown the plea form that says that I 'will' be deported but I can assure that was not interpreted to me; I was simply told that I was giving up certain rights and I was to initial and sign the form." Defendant further declared that his attorney "never mentioned the immigration consequences of this case" and that he would have "willingly gone to trial" if he knew he was "facing permanent deportation." Defendant also proclaimed that "[u]nbeknownst to [him], he had meth precursor materials in the car" and that he "was shocked to learn that the material was in the car."

The People filed a written opposition to defendant's motion to vacate or withdraw on July 10, 2017, with supporting exhibits.

The trial court heard defendant's motion to vacate or withdraw his plea on July 14, 2017. After having read the motions and hearing testimony from defendant and argument by the parties, the court denied defendant's motion. The court found defendant to be "untrustworthy," noting defendant claimed that he was never advised of the immigration consequences, but the court had a transcript from the plea hearing, in which that court had specifically informed defendant of the immigration consequences. The court also explained, "Additionally, he's indicated he has a bad memory for many things, when he was being asked specifically about whether there was an interpreter present. Which in taking judicial notice of the file, there was. And that that interpreter indicated that they went over the form with the defendant. And the attorney indicated that they went over the form with the defendant. [¶] So defense's evidence to proffer that the appropriate thing was not done, not ineffective assistance of—which I know counsel's not arguing—is the defendant's statements which this Court is finding to be self-serving. [¶] I do not have that witness, indicating, no, I never advised him of such. No, I never approached the DA. [¶] I don't have any evidence. It is completely empty. Other than the defendant saying, I was not advised. [¶] And this Court finds that to be insufficient under [section] 1473.7." The court further concluded that, "Based upon all of those factors, I do not find that defense has shown prejudicial error to the point that the defendant would have done something different had he been aware, nor is this Court satisfied that he was not aware of the consequences in this case."

On August 18, 2017, defendant filed a timely notice of appeal.

III

DISCUSSION

Defendant contends the trial court erred in denying his motion to vacate his 2000 plea under section 1473.7 because his trial counsel rendered ineffective assistance of counsel by failing to advise him of the immigration consequences of his no contest plea, and by failing to negotiate an "immigration safe" plea to being an accessory after the fact under section 32.

A. *Section 1473.7 Procedure*

Section 1473.7, which became effective on January 1, 2017, provides that a person who is no longer imprisoned may move to vacate a judgment if the "conviction or sentence is legally invalid due to a *prejudicial error* damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subd. (a)(1), italics added.)

The three requirements of section 1473.7 include: (1) the moving party not being imprisoned or restrained; (2) a timely motion; and (3) *prejudicial error* damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or no contest, or newly discovered evidence of actual innocence. (*People v. Perez* (2018) 19 Cal.App.5th 818, 820, 826 (*Perez*).) As the italicized language provides, a defendant making such a claim is required to demonstrate that he or she suffered "prejudicial error."

The defendant has the burden of establishing the grounds for the motion by a preponderance of the evidence (§ 1473.7, subd. (e)), and is entitled to a hearing. (§ 1473.7, subd. (d).) The resulting order is appealable as an order after judgment affecting the substantial rights of a party under section 1237, subdivision (b). (§ 1473.7, subd. (f).)

A proper section 1016.5 advisement by the trial court (or district attorney) is not a bar to a section 1473.7 motion. (See *People v. Patterson* (2017) 2 Cal.5th 885, 896 (*Patterson*) ["receipt of the section 1016.5 advisement does not bar a criminal defendant from challenging his conviction on the ground that his counsel was ineffective in failing to adequately advise him about the immigration consequences of entering a guilty plea"].)

The legal effect of section 1473.7 is procedural, and it applies retroactively. (*Perez, supra,* 19 Cal.App.5th at pp. 824-829.) Motions for relief based on alleged violations of immigration protections are almost always made years or even decades after the underlying criminal convictions. Commonly, they are brought only after removal proceedings or other adverse immigration actions are initiated by the federal government. This passage of time, often referred to as a lack of "due diligence," has, by itself, created insurmountable procedural bars that have foreclosed virtually all avenues of collateral attack on criminal judgments, regardless of the merits of the underlying action.

This is clearly demonstrated by two of the leading California Supreme Court cases in this area. Applying the traditional rule that postconviction relief must be sought with

reasonable diligence from the time that the defendant became aware, or should have become aware, of the issue that underlies the challenge (see *People v. Shipman* (1965) 62 Cal.2d 226, 230), our Supreme Court held in *People v. Kim* (2009) 45 Cal.4th 1078, that petitions for writ of error coram nobis, the legal equivalent of a motion to vacate a plea, must be brought within a reasonable time of the defendant becoming aware of the issue. (*Id*. at p. 1096.) Noting that the defendant in that case must have been aware of his immigration status at the time he entered his plea, the Supreme Court ruled that the "reasonable" time for seeking postconviction relief began to run from the time the defendant was informed in court of immigration consequences. (See, e.g., *id*. at pp. 1098-1099.)

Furthermore, generally, vacating a conviction based on ineffective assistance of counsel is not available when, as here, the time for filing an appeal has expired and relief by writ of habeas corpus is unavailable because the person is no longer in state custody. (See *People v. Villa* (2009) 45 Cal.4th 1063, 1072; *People v. Aguilar* (2014) 227 Cal.App.4th 60, 68.) *Villa* did not deal directly with a timing issue characterized as "due diligence" but, rather, applied a limitation on relief that resulted indirectly from the passage of time. *Villa*'s holding is that section 1473, subdivision (a)'s requirement that a person seeking habeas corpus be "'unlawfully *imprisoned* or *restrained* of his [or her] liberty'" (*Villa*, at p. 1068) renders habeas corpus unavailable to a defendant who has completed his or her state sentence but who is in federal immigration custody pending removal or other immigration proceedings. This, too, had the effect of placing a time-

based limitation on the seeking of relief and created a substantial bar to challenging the effectiveness of counsel in immigration cases.

Section 1473.7 was enacted to remove those barriers. Subdivision (a) of section 1473.7 eliminates the "imprisoned or restrained" requirement of section 1473, subdivision (a)(1), in immigration cases. Section 1473.7, subdivision (b), now allows motions to vacate pleas or to otherwise seek relief based on alleged errors related to immigration issues to be made "with reasonable diligence" after the later of the following: (1) the moving party receives a notice to appear in immigration court or some other notice from immigration authorities alleging a criminal conviction as a basis for removal; or, (2) the date of finality of a removal order based on a criminal conviction.

These are both significant changes in the law and create a greatly expanded procedural window for defendants to seek relief in immigration cases. There has been no argument that defendant does not fall within the purview of section 1473.7 and that his challenge to his underlying conviction is procedurally barred. We hold that section 1473.7 applies to defendant's action and that there is no procedural bar to his bringing it.

B. *Standard or Review*

The People contend that we should review the court's order for an abuse of discretion, citing decisions involving sections 1016.5 and 1018. (See, e.g., *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 192; *Patterson, supra*, 2 Cal.5th at pp. 894-895; *People v. Arendtsz* (2016) 247 Cal.App.4th 613, 617.) These statutes,

however, do not implicate the defendant's constitutional rights. Section 1016.5 permits a court to grant a motion to withdraw a guilty plea when the court failed to provide a statutorily required notice to the defendant prior to taking the defendant's plea (§ 1016.5, subd. (b)). And, section 1018 permits a court to grant a defendant's application to withdraw a plea "for a good cause shown" (§ 1018), such as the defendant's "[m]istake, ignorance or any other factor overcoming the exercise of free judgment." (*People v. Cruz* (1974) 12 Cal.3d 562, 566.)

When, however, the trial court's decision implies the rejection of a defendant's argument that he or she has been deprived of a constitutional right, such as the right to effective assistance of counsel, the issue is a mixed question of law and fact, which we determine independently. (See, e.g., *In re Resendiz* (2001) 25 Cal.4th 230, 249 (*Resendiz*), abrogated in part on other grounds in *Padilla v. Kentucky* (2010) 559 U.S. 356, 370 (*Padilla*); *People v. Ledesma* (1987) 43 Cal.3d 171, 219, (*Ledesma*); see generally *People v. Ault* (2004) 33 Cal.4th 1250, 1264 [de novo review of mixed law and fact questions is particularly favored when a constitutional right is implicated].) Thus, in *People v. Taylor* (1984) 162 Cal.App.3d 720, the court noted that although the denial of a motion for new trial is ordinarily reviewed for abuse of discretion, when the motion is based upon the defendant's allegation that he was deprived of his constitutional right to the effective assistance of counsel, the appellate court will indulge all presumptions in favor of the trial court's express and implied factual findings, but retain "'"the ultimate responsibility . . . to measure the facts, as found by the trier, against the constitutional

standard . . . .” [Citation.] On that issue, in short, the appellate court exercises its independent judgment.’ [Citations.]” (*Id*. at pp. 724-725.)

Prior to oral argument, the People provided this court with new authority relevant to the standard of review. The People directed this court to *People v. Gonzalez* (2018) 27 Cal.App.5th 738 (*Gonzalez*). In *Gonzalez*, the appellate court noted that under section 1473.7, a decision to deny a motion to withdraw a guilty plea rests in the sound discretion of the trial court, and concluded abuse of discretion is the correct standard. (*Id*. at pp. 746-747.)

We acknowledge that tAddhe standard of review applicable to the denial of a section 1473.7 motion is unsettled, insofar as defendant claims a deprivation of the constitutional right to effective assistance of counsel. To the extent the motion asserts statutory error or a deprivation of statutory rights, the denial is reviewed for an abuse of discretion. (See *Gonzalez*, *supra*, 27 Cal.App.5th at pp. 746-747; *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76 (*Ogunmowo*).) However, to the extent the motion asserts ineffective assistance of counsel, there is a division among the appellate courts whether the denial is reviewed under the “abuse of discretion” standard or the less deferential standard applicable to “‘a mixed question of fact and law.’” (*Gonzalez*, at p. 747; *Ogunmowo*, at p. 76 [Court of Appeal applied de novo standard in reviewing the trial court’s order denying the defendant’s motion to vacate his conviction under section 1473.7].) Here, it is unnecessary to resolve that dispute because—as discussed

further below—defendant's challenge fails under the standard for a mixed question of fact and law.

Under the de novo standard of review, "[w]e accord deference to the trial court's factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel's deficient performance and resulting prejudice to the defendant. [Citations.]" (*Ogunmowo*, *supra*, 23 Cal.App.5th at p. 76.) Furthermore, when the trial court heard no live testimony, we independently examine the written evidence in order to determine the facts it establishes and need not defer to the trial court's findings. (*Id.* at pp. 79-80.)

C. *Ineffective Assistance of Counsel*

Section 1473.7 did not affect the standards by which motions to vacate pleas based on an alleged Sixth Amendment violation due to deficient performance of counsel are decided. A defendant who seeks to vacate a conviction on this ground must still establish two things: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) that he or she was prejudiced by that deficient performance. (*Lee v. United States* (2017) __ U.S. __, 137 S.Ct. 1958, 1964 (*Lee*); *Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Williams* (1997) 16 Cal.4th 153, 215; *Ledesma*, *supra*, 43 Cal.3d at p. 216.) The defendant bore the burden of proving these elements by a preponderance of the evidence (*Ledesma*, at p. 218), and, on appeal, has the burden of affirmatively establishing error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *People v. Garza* (2005) 35 Cal.4th 866, 881.)

The United States Supreme Court's decision in *Padilla*, *supra*, 559 U.S. 356 forms the basis for defendant's argument that his trial counsel's performance was deficient. In *Padilla*, the United States Supreme Court ruled that defense attorneys have an affirmative obligation to provide competent advice to noncitizen criminal defendants regarding the potential immigration consequences of guilty or no contest pleas. (*Id*. at pp. 367, 369.)[3] The nature of the advice that counsel must give regarding the immigration consequences of a plea depends upon the likelihood that the client will be deported as a result of a conviction. "When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen that pending criminal charges may carry a risk of adverse immigration consequences." (*Id*. at p. 369.) When, however, "the law is 'succinct, clear, and explicit' that the conviction renders removal virtually certain, counsel must advise his client that removal is a virtual certainty." (*United States v. Rodriguez-Vega* (9th Cir. 2015) 797 F.3d 781, 786, quoting *Padilla*, at pp. 368-369.) Here, it appears the parties agree that defendant's conviction for possession with intent to manufacture methamphetamine (Health & Saf. Code, § 11383, subd. (c)(1)) would result in defendant's deportation, since that offense is an aggravated felony.

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[3] In 2015, the Legislature expressed its intent to codify the holding of *Padilla* by enacting section 1016.3, which provides: "Defense counsel shall provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards, defend against those consequences." (§ 1016.3; see § 1016.2, subd. (h).)

The parties disagree whether professional norms in 2000 imposed upon defense counsel an affirmative duty to investigate and advise on immigration consequences. Defendant points to evidence of such norms in American Bar Association (ABA) standards and practice guides dating from the 1990's (see, e.g., *Padilla*, *supra*, 559 U.S. at p. 367), and he points to pre-2005 California decisions recognizing a duty to advise. (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1481-1482 [vacating judgment where counsel "merely warned defendant that his plea might have immigration consequences," based on an ABA standard that: "'[W]here the defendant raises a specific question concerning collateral consequences (as where the defendant inquires about the possibility of deportation), counsel should fully advise the defendant of these consequences'"]; *People v. Barocio* (1989) 216 Cal.App.3d 99, 103-104 [vacating sentence (but not plea) so counsel could request a sentence with a recommendation against deportation because counsel "failed to advise [defendant] of [this] deportation remedy," thereby falling short of his duty to "make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation"]; *People v. Bautista* (2004) 115 Cal.App.4th 229, 238, 241 (*Bautista*) [issuing order to show cause on petition for writ of habeas corpus where counsel failed to investigate an immigration-neutral upward plea because it "never crossed his mind"].) The People counter that the United States Supreme Court did not recognize a Sixth Amendment duty to advise on collateral immigration consequences until 2010 (*Padilla*, at p. 367) and that the court has since held that this "new rule" is not retroactive. (*Chaidez v. United States* (2013) 568 U.S. 342, 357-358.)

We note that the California Supreme Court disavowed the collateral-direct consequences distinction in 2001 (nine years before *Padilla*), and expressly reserved the question whether there was at that time an affirmative duty to advise (*Resendiz*, *supra*, 25 Cal.4th at pp. 240, 248, 250). But we need not express an opinion on the issue because even if defendant's trial counsel had an affirmative duty to advise him on the immigration consequences of his plea, counsel satisfied the duty. The immigration admonition was unequivocal and accurate. Defendant, as stated above, declared on the plea advisement form that he understood he would be deported for his no contest plea, and the word "WILL" was substituted on the form for the word "could." This is identical to a statement that deportation is virtually certain. In addition, as the trial court noted at the motion to vacate the plea hearing, defendant stated "yes" at his taking of the plea hearing when asked by the trial court if he understood he "will be" deported for his no contest plea. Furthermore, defendant declared that he understood the entirety of the plea form as explained to him by his trial counsel and as translated to him in Spanish. Defendant not only initialed the box next to the "will be" deported language in the plea advisement form, but also acknowledged by his signature on the form that he had read, understood, and agreed with this language and discussed it with his attorney. And, defendant, along with trial counsel and the interpreter, all signed the plea form. When the statements made in court are viewed together with the evidence of the plea advisement form, the record supports a reasonable inference that defendant's trial attorney adequately advised him of the immigration consequence of the plea.

People v. Olvera (2018) 24 Cal.App.5th 1112 (*Olvera*), a case submitted by the People prior to oral argument, is instructive. In *Olvera,* at page 1114, the defendant pleaded no contest to drug-related charges in 2005. Prior to the plea, he signed a "plea form" stating, "'I hereby expressly assume that my plea . . . will, now or later, result in my deportation, exclusion from admission or readmission,' and 'denial of naturalization and citizenship.'" (*Id*. at p. 1115.) The form further stated that the defendant had discussed the form with his counsel, who explained the consequences of the plea. (*Ibid*.) At the plea hearing, there was no specific colloquy regarding immigration consequences, but the defendant acknowledged that he had discussed the form with his counsel and a translator. (*Ibid*.) Later, the defendant filed a section 1473.7 motion, alleging ineffective assistance of counsel. (*Ibid*.) The motion relied on the defendant's declaration, which asserted that although he had reviewed the waiver of rights form with defense counsel, he could not recall discussing the specific immigration consequences of the plea. (*Ibid*.) After the trial court denied the motion, the appellate court affirmed under the standard for a mixed question of law and fact. (*Id*. at pp. 1116-1117.) The court concluded that the admonition in the waiver of rights form satisfied any duty imposed on defense counsel to advise the defendant regarding immigration consequences, remarking: "The admonition was boilerplate, but it was unequivocal and accurate." (*Id*. at p. 1117.)

In *People v. Tapia* (2018) 26 Cal.App.5th 942 (*Tapia*), the appellate court reached a similar conclusion on similar facts. There, in 2012, the defendant pleaded no contest to several drug-related offenses. (*Id*. at p. 944.) Prior to the plea hearing, the defendant

completed a plea form stating: "'[I]f not a citizen, my plea may have the consequence of my deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States.'" (*Id*. at p. 945.) The defendant placed his initials next to that statement and signed the form beneath an affirmation that he had read the form, discussed it with his counsel, and understood it; defense counsel and a translator also signed the form. (*Ibid*.) At the plea hearing, the trial court inquired, "'[D]o you understand [that] if you're not a citizen of the United States and you enter a plea of . . . no contest, it *will* result in your being deported to your country of origin and never being allowed to legally return to this country and never being allowed to become a legal citizen of this country.'" (*Id*. at p. 946.) The defendant replied, "'Yes.'" (*Ibid*.) Later, the defendant filed a section 1473.7 motion based on ineffective assistance of counsel, and submitted a declaration stating that he was not told that his conviction could lead to deportation. (*Id*. at p. 947.) In affirming the denial of the motion under the standard applicable to a mixed question of law and fact, the appellate court declined to accept the defendant's "self-serving" declaration. (*Id*. at pp. 953, 955.)

Olvera and *Tapia* are dispositive here. Defendant's waiver of rights form stated that he "*WILL* be deported, or excluded from admission to the United States, or denied naturalization." (Italics added.) In addition to defendant's express acknowledgment that he had had an opportunity to discuss those consequences with defense counsel and understood them, the form contained similar acknowledgments by defense counsel and a translator. At the plea hearing, when the court asked defendant whether he understood

that his plea "will" result in his deportation, exclusion from the United States, or denial of naturalization, he replied, "Yes." Under these circumstances, defendant's "self-serving claim" in his declaration that defense counsel failed to advise him regarding immigration consequences is not reasonably credited. (*Tapia*, *supra*, 26 Cal.App.5th at p. 955.) Accordingly, defendant has not demonstrated ineffective assistance of counsel.

Prior to oral argument, defense counsel directed this court to *People v. Espinoza* (2018) 27 Cal.App.5th 908 (*Espinoza*). We find *Espinoza* distinguishable from the present matter. This court in *Espinoza* found defense counsel's warning of possible deportation constitutionally inadequate when federal immigration law made clear that deportation was mandatory. (*Id.* at pp. 914-918.) The defendant's plea in *Espinoza*, unlike Bernal's here, was entered two years after the U.S. Supreme Court's decision in *Padilla*, which was decided in 2010, and was governed by post-*Padilla* standards. In *Espinoza*, the defendant pled guilty in November 2012. (*Espinoza*, at p. 911.) Here, defendant pled guilty in September 2000, approximately 10 years prior to the decision in *Padilla*.

In addition, the court in *Espinoza* identified a variety of factors that corroborated statements in the defendant's declaration. (See *Espinoza*, *supra*, 27 Cal.App.5th at pp. 915-918.) Here, as discussed, the corroborating evidence required to upend a plea (see *Lee*, *supra*, __ U.S. __, 137 S.Ct. at p. 1967) is absent. In *Espinoza*, unlike here, the defendant was advised by the trial court and in the plea form that his conviction for

possession of methamphetamine for sale *may* have the consequences of deportation. (*Espinoza,* at p. 914.)

Defendant also contends counsel's performance was deficient when he did not investigate an immigration-neutral disposition. By 2005, a California court had concluded that the mere failure to investigate an immigration-neutral alternative disposition in plea bargaining could constitute deficient performance. (*Bautista*, *supra*, 115 Cal.App.4th at p. 238.) But defendant's showing is insufficient to prevail under this theory of deficiency.

In *Bautista*, counsel advised the defendant he "'would be deported'" as a result of a plea of guilty to possessing marijuana for sale, but counsel did not attempt to plead upward to an available immigration-neutral offense. (*Bautista*, *supra,* 115 Cal.App.4th at p. 238.) An expert in immigration law declared that the defendant could have "'plead[ed] up'" to an offense with greater sentencing exposure, but less severe immigration consequences, which the expert believed the prosecutor would have accepted. Prosecutors had agreed to the disposition in similar cases on which the expert had consulted. (*Id*. at p. 240.) The *Bautista* court concluded the claim was viable and issued an order to show cause for an evidentiary hearing in the trial court. (*Id*. at pp. 241-242.)

In the present case, defendant did not provide a declaration from any immigration expert. Moreover, he did not provide a declaration from his trial counsel to show trial counsel had attempted to negotiate a non-aggravated felony disposition that would not have resulted in defendant's deportation, or that the prosecutor would have likely agreed

to an immigration-neutral offense to which defendant might have pled. As the trial court noted, defendant merely speculates, with no corroborating evidence, that his trial counsel did not attempt to secure an "immigration safe" disposition, such as under section 32, or that the prosecutor would have likely agreed to such a disposition.

Because defendant has not established that his trial counsel rendered deficient performance, he is not entitled to relief. The trial court, therefore, did not err when it denied his motion to vacate.

IV

DISPOSITION

The order denying defendant's section 1473.7 motion to vacate his 2000 no contest plea is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
Acting P. J.

We concur:

SLOUGH
J.

FIELDS
J.